Filed 4/23/19 Casillas v. Central Cal. Faculty Medical Group, Inc. CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

TANSI A. CASILLAS, Plaintiff and Respondent, v. CENTRAL CALIFORNIA FACULTY MEDICAL GROUP, INC., Defendant and Appellant;	F075028 (Super. Ct. No. 15CECG00549) **OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. Alan M. Simpson, Judge.

Epstein Becker & Green, Steven Blackburn, Matthew Goodin and Elizabeth Boca for Defendant and Appellant.

Law Offices of Parnell Fox and Parnell Fox for Plaintiff and Respondent.

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Plaintiff Tansi A. Casillas sued her former employer, Central California Faculty Medical Group, Inc. (Medical Group), for terminating her employment because she internally reported potential legal violations of Medicare and respiratory care regulations and subsequently refused to participate in that activity. She alleged the retaliatory

discharge violated whistleblower provisions in subdivisions (b) and (c) of Labor Code section 1102.5 (section 1102.5) and constituted the common law tort of wrongful discharge in violation of public policy. The jury found for Casillas on all three claims, awarding her $131,200 for past economic and noneconomic damages and $500,000 in punitive damages.

Medical Group appealed, contending it was entitled to judgment on the pleadings on the statutory cause of action alleging a discharge in retaliation for internally reporting potentially illegal activity. In 2013, when Casillas made her internal complaints, the version of section 1102.5, subdivision (b) in effect protected disclosures made to government and law enforcement agencies but did not extend to internal reports. Medical Group contends the version of the statute that became effective on January 1, 2014, and extended protection to internal reporting cannot be applied retroactively to Casillas's 2013 complaints because they *were not protected activity when made*.

Casillas contends applying the version of section 1102.5, subdivision (b) that became effective on January 1, 2014, to the termination of her employment that occurred on January 3, 2014, is not a retroactive application of the new legislation. She argues applying the amended version of the statute did not change the legal consequences of any past conduct by Medical Group. We agree. Under California Supreme Court decisions defining the concept of retroactivity, applying the whistleblower protections that became effective on January 1, 2014, to a discharge that occurred two days *later* is not a retroactive application of the new legislation. Accordingly, the award of damages under that cause of action will be upheld.

We therefore affirm the judgment.

FACTS

Defendant Central California Faculty Medical Group, Inc. (Medical Group) operates a multi-specialty medical practice affiliated with the UCSF Fresno Medical

School. It has approximately 16 separate medical offices or practice sites, which it refers to as University Centers of Excellence.

In November 2008, Casillas was hired by Medical Group to work as a respiratory therapist. She worked at the University North office, which had two different specialties. The pulmonary side treated patients with breathing problems and the sleep side treated patients with sleep disorders. Karl Van Gundy, M.D., was the medical director of the pulmonary side and Lynn Keenan, M.D., was the medical director of the sleep side.[1] From 2010 through the date of Casillas's termination, Dr. Van Gundy also was Medical Group's president and its chairman of the board.

Casillas's duties involved both specialties. On the pulmonary side, she performed pulmonary function tests (PFT) in which she met with patients and administered a bronchodilator to measure lung volume and oxygen intake. On the sleep side of the practice, Casillas sent out orders for durable medical equipment and instructed patients how to do home sleep tests. Her schedule also included download appointments in which she would meet with patients who brought in the memory chip from the continuous positive airway pressure (C-PAP) machine the patient was using at home to treat sleep apnea. Patients wear a mask and the machine pressurizes the air inside the mask to keep the patient's airway open. The machine measures and records whether there is enough pressure to keep the airway open. Casillas would evaluate the information on the machine's memory chip and determine if adjustments to the pressures and future treatment were needed.

Casillas received high ratings in performance appraisals completed in September 2011 and November 2012. The difficulties that are the subject of her lawsuit began in April 2013 when Casillas reported to Dr. Keenan that it was illegal for Medical Group to bill Medicare as if a doctor had seen the patient during the C-PAP download

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1 Drs. Van Gundy and Keenan married in April 2016.

appointment. Casillas also stated her view that the way appointments were handled exceeded the scope of her license as a respiratory therapist.

When Casillas felt Dr. Keenan was not taking the matter seriously, Casillas reported her concerns to Charlotte Stoffel-Quinn, Medical Group's compliance manager. Stoffel-Quinn's responsibilities included ensuring Medical Group complied with Medicare regulations and accurately billed for its services. Casillas also sent a report to Stoffel-Quinn in September 2013 stating that Medical Group was still using a nonphysician to see patients during a download appointment and Casillas believed a physician needed to meet with the patient.

Casillas alleged and proved that these and other reports made by her during 2013 caused Medical Group personnel to take retaliatory action against her.[2] The details of the retaliation and Casillas's other reports are not material to the issues decided in this appeal.

On January 3, 2014, Casillas met with Debbie Maney, Medical Group's director of business operations, and Mary Ann Garcia. They informed Casillas that her employment was being terminated.

PROCEEDINGS

In February 2015, Casillas filed a complaint against Medical Group for discrimination based on age and gender, retaliation, and wrongful termination in violation

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[2] Casillas's evidence included testimony from Diana Scott, a former director of the University Centers of Excellence who had been employed by Medical Group from September 2008 through February 2013. Before Medical Group terminated Scott's employment, she had raised concerns about (1) staff placing electronic physician signatures on medical records and the records being sent to outside providers and (2) the potentially fraudulent billing involving those records. Scott's wrongful termination lawsuit included an appeal to this court. (*Scott v. Central California Faculty Medical Group, Inc.* (Mar. 29, 2018, F073260) [nonpub. opn. reversing judgment and remanding for further proceedings on cause of action for wrongful discharge in violation of public policy].) Scott's discharge, unlike Casillas's, occurred before January 1, 2014, the effective date of the amendment that broadened subdivision (b) of section 1102.5.

of public policy. In April 2016, Casillas filed a first amended complaint alleging age discrimination in violation of Government Code section 12940,[3] retaliation in violation of Labor Code section 1102.5, and wrongful termination in violation of public policy. Her first amended complaint is the operative pleading in this case.

Prior to trial, Medical Group filed a motion for judgment on the pleadings challenging Casillas's cause of action under section 1102.5, subdivision (b) on the ground it required a retroactive application of an amendment to that provision. The trial court denied the motion.

The jury trial was held in September and October of 2016. The special verdict form presented to the jury contained 25 numbered questions covering three causes of action—a violation of section 1102.5, subdivision (b); a violation of section 1102.5, subdivision (c); and wrongful termination in violation of public policy. The jury found for Casillas on all three claims and awarded economic ($111,200) and noneconomic damages ($20,000). The jury also found that one or more of the officers, directors or managing agents of Medical Group engaged in the retaliatory conduct with malice, oppression or fraud. The jury awarded $500,000 in punitive damages.

In November 2016, the trial court filed a judgment stating Casillas shall recover from Medical Group damages in the sum of $131,200, punitive damages in the sum of $500,000 with interest thereon from the date of the verdict until paid, and costs and attorney fees in amounts to be determined. Medical Group filed a motion for judgment notwithstanding the verdict, which the trial court denied. Medical Group timely filed a notice of appeal challenging the judgment and the order denying the motion for judgment notwithstanding the verdict.

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3 Casillas voluntarily dismissed her age discrimination claim.

DISCUSSION

I. RETALIATION AGAINST A WHISTLEBLOWER

A. Claim Decided by the Jury

Casillas's first amended complaint described her second cause of action as wrongful termination in violation of section 1102.5. Casillas alleged Medical Group terminated her employment "in retaliation for reporting medical compliance issues, including but not limited to engaging in illegal medical practices (*e.g.*, practicing medicine without a license, Medicare fraud) and because of her refusal to participate in these illegal medical practices." Subdivision (b) of section 1102.5 prohibits retaliation against an employee who reports a violation of law. Subdivision (c) of the statute prohibits retaliation against an employee who refuses to participate in illegal activities.

The essential factual elements of the claims under subdivisions (b) and (c) of section 1102.5 were stated in separate jury instructions. The special verdict form presented the violation of each subdivision as a separate claim. The jury answered "yes" to six questions covering the elements of the cause of action under subdivision (b) of section 1102.5 and answered "no" to whether Medical Group would have discharged Casillas anyway at that time for legitimate, independent reasons. The jury found her past economic damages totaled $111,200 based on $66,947 in lost earnings and benefits and $44,253 in other past economic loss. It also found Casillas suffered $20,000 in emotional distress. These damages totaled $131,200. The jury awarded no damages for future losses.

B. Medical Group's Challenges to the Claim

Prior to trial, Medical Group filed a motion for judgment on the pleadings, arguing Casillas could not establish a claim under section 1102.5, subdivision (b). The motion stated (1) the version of the statute in effect before January 1, 2014, provided protection to an alleged whistleblower only if he or she made a complaint about illegal activity to an

outside government agency; (2) Casillas never made a complaint to a government agency; and (3) all of the complaints Casillas made to Medical Group occurred in 2013, before an amendment protecting internal reporting went into effect. Medical Group argued the amendment should not be applied retroactively and, as a result, the claim under section 1102.5, subdivision (b) should not be presented to the jury. The trial court heard arguments from counsel and denied the motion.

After the trial, Medical Group filed a motion for judgment notwithstanding the verdict that reasserted the argument that Casillas's internal complaints were not protected activity when they were made in 2013. Medical Group stated multiple cases had held that the 2014 amendment of section 1102.5, subdivision (b) does not apply retroactively. On appeal, Medical Group contends the trial court erred in denying its motion for judgment on the pleadings on Casillas's claim under section 1102.5, subdivision (b). Medical Group contends the trial court's decision is subject to de novo review and the undisputed evidence shows Casillas did not engage in protected activity. Medical Group argues Casillas's alleged whistleblowing occurred in 2013 and "the trial court was required to apply the version of Labor Code section 1102.5(b) in effect at that time." The parties' contentions about retroactivity present a question of statutory interpretation, which is a question of law subject to an independent determination on appeal. (*Peredia v. HR Mobile Services, Inc.* (2018) 25 Cal.App.5th 680, 687.)

C. Statutory Text

"In 1984, our Legislature provided 'whistle-blower' protection in section 1102.5, subdivision (b), stating that an employer may not retaliate against an employee for disclosing a violation of state or federal regulation to a governmental or law enforcement agency." (*Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 76–77 (*Green*).) The version of section 1102.5, subdivision (b) in effect during 2004 through 2013 stated:

> "An employer may not retaliate against an employee for disclosing information to a government or law enforcement agency, where the

> employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation." (Stats. 2003, ch. 484, § 2.)

That version of the statute concerns employees who report to public agencies and does not protect an employee "who reported his suspicions directly to his employer." (*Green, supra,* 19 Cal.4th at p. 77.) In 2013, the Legislature expanded the statute to prohibit a wider range of employer retaliation, including retaliation based on internal reporting of potential violations. The version of subdivision (b) of section 1102.5 that became effective on January 1, 2014, provides:

> "An employer, *or any person acting on behalf of the employer, shall* not retaliate against an employee for disclosing information, *or because the employer believes that the employee disclosed or may disclose information,* to a government or law enforcement agency, *to a person with authority over the employee or another employee who has the authority to investigate, discover, or correct the violation or noncompliance, or for providing information to, or testifying before, any public body conducting an investigation, hearing, or inquiry, if* the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation of or noncompliance with a *local,* state, or federal rule or regulation, *regardless of whether disclosing the information is part of the employee's job duties*." (Stats. 2013, ch. 781, § 4.1, italics added.)

Italics signify the language that became effective on January 1, 2014. The statute is not ambiguous as to the conduct prohibited. It plainly states an employer shall not retaliate against an employee for the reasons listed. The text does not include any limitation as to when the employee disclosures may have occurred. In particular, the statute does not state that an employer shall not retaliate based on a disclosure that occurs *after* the effective date of the statute. Medical Group's arguments can be viewed as asserting the statute should be interpreted to include such a limitation—that is, such a limitation is implied. As a general rule, courts interpreting a statute simply "ascertain and declare what is in the terms or in the substance contained therein." (Code Civ. Proc., § 1858.) The role of the court is "not to insert what has been omitted." (*Ibid.*) Here, we will not insert a requirement that the retaliation be in response to internal reporting that

occurred after the effective date of the amendment to section 1102.5, subdivision (b). The Legislature did not include such a limitation and Medical Group has presented no legislative history showing that the Legislature intended the statute to be construed in that manner.

D. Retroactivity

Medical Group did not phrase its argument in terms of statutory construction. Instead, it relies on the established principle that new legislation is presumed to operate prospectively absent an express declaration of retrospectivity or a clear indication that the Legislature intended otherwise. (*Tapia v. Superior Court* (1991) 53 Cal.3d 282, 287 (*Tapia*).) Here, the legal issue presented is whether applying the January 1, 2014, version of section 1102.5, subdivision (b) to Casillas's discharge gives retroactive[4] effect to that version.

The concept of retroactivity is not always easy to apply to a given statute. (*Landgraf v. USI Film Products* (1994) 511 U.S. 244, 268; *Quarry*, *supra*, 53 Cal.4th at p. 955.) Courts must consider the nature and extent of the change in law and the degree of connection between the operation of the new rule and a relevant past event. (*Quarry*, *supra*, at p. 955.) Familiar considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance for determining whether a particular application of the statute is retroactive. (*Id*. at pp. 955–956.) Generally, a law has retroactive effect when it functions to change the legal consequences of a party's past conduct by imposing new or different liabilities based upon such conduct. (*Id*. at p. 956.)

> "In general, application of a law is retroactive only if it attaches new legal consequences to, or increases a party's liability for, an event, transaction, or conduct that was completed before the law's effective date. [Citations.]

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4 We conclude the terms "retroactive" and "retrospective" have the same meaning. (Cf. *Quarry v. Doe I* (2012) 53 Cal.4th 945, 955 (*Quarry*), with *Tapia*, *supra*, 53 Cal.3d at p. 288; see 2 Singer & Singer, Statutes and Statutory Construction (7th ed. 2009) § 41:1, p. 382.)

> Thus, the critical question for determining retroactivity usually is whether *the last act or event necessary to trigger application* of the statute occurred before or after the statute's effective date. [Citations.] A law is not retroactive 'merely because some of the facts or conditions upon which its application depends came into existence prior to its enactment.' [Citation.]" (*People v. Grant* (1999) 20 Cal.4th 150, 157, italics added (*Grant*).)

Applying these principles to the facts presented, we conclude the finding that Medical Group violated section 1102.5, subdivision (b) does not involve a retroactive application of the version of section 1102.5, subdivision (b) that became effective on January 1, 2014.

As stated in *Grant*, the usual test for retroactivity addresses whether the last act or event necessary to trigger application of the statute occurred before or after the statute's effective date. (*Grant*, *supra*, 20 Cal.4th at p. 157.) Here, the last act was Medical Group's termination of Casillas's employment. That act occurred on January 3, 2014, which is after the amendment to section 1102.5, subdivision (b) became effective. Accordingly, the usual test for retroactivity leads to the conclusion that applying the new version of the statute to the January 3, 2014, discharge of Casillas does not give that version retroactive effect. Stated another way, applying the new version of the statute does not change the legal consequences of conduct of Medical Group *completed* before that version's effective date, only conduct completed after the effective date. (See *Grant*, *supra*, 20 Cal.4th at p. 157; *Dept. of Health Services v. Fontes* (1985) 169 Cal.App.3d 301, 304 [ultimate test of retroactivity is whether the statute as applied changes the legal effect of past transactions].)

Furthermore, considerations of fair notice also support the conclusion that the amended version of section 1102.5, subdivision (b) can be applied to Casillas's discharge without giving it retroactive effect. (See *Quarry*, *supra*, 53 Cal.4th at pp. 955–956.) The statute was in effect when Medical Group acted and, therefore, Medical Group had notice or warning that terminating Casillas's employment in retaliation for internal reporting

violated California law. (See generally, 2 Singer & Singer, Statutes and Statutory Construction, *supra*, § 41:2, pp. 386–387.)

We recognize some of the facts relevant to the application of the amended version of the statute—specifically, Casillas internal reporting of potentially illegal activity—occurred in 2013 before the amendment's effective date. However, the existence of these facts does not mean the statute is being applied retroactively in this case. It is well settled that "[a] statute does not operate retroactively merely because some of the facts or conditions upon which its application depends came into existence prior to its enactment. [Citations.] Or, in other words, … a statute is not retroactive merely because it draws upon antecedent facts for its operation." (*Burks v. Poppy Const. Co.* (1962) 57 Cal.2d 463, 474.)

Based on the foregoing principles, we conclude the trial court did not err when it denied Medical Group's motion for judgment on the pleading or, subsequently, when it denied Medical Group's motion for judgment notwithstanding the verdict. Allowing Casillas to pursue a claim that her January 3, 2014, termination violated section 1102.5, subdivision (b) did not involve a retroactive application of the statute. The governing statute is the one in effect on the date of the discharge.

E. Federal Decisions

Medical Group has cited federal district court decisions to support its argument that the amended version of section 1102.5, subdivision (b) does not apply retroactively. (See *Canupp v. Children's Receiving Home of Sacramento* (E.D.Cal. 2016) 181 F.Supp.3d 767 (*Canupp*); *Robles v. Agreserves, Inc.* (E.D.Cal. 2016) 158 F.Supp.3d 952 (*Robles*).)

In *Robles*, the plaintiff was employed as a seasonal farm laborer and sprayer from February 4, 2013, to April 1, 2013. (*Robles*, *supra*, 158 F.Supp.3d at p. 966.) His 13th cause of action alleged a violation of section 1102.5 based on complaints about wage and

hour violations and unsafe working conditions. (*Robles, supra,* at p. 1007.) His complaints were brought to his manager's "attention via a written statement on April 1, 2013—after his employment was terminated." (*Ibid*.) The district court granted summary judgment on the cause of action under section 1102.5, subdivision (b), stating:

> "Under the 2013 version of § 1102.5, only complaints or reports made to a governmental agency are protected; complaints or reports made 'internally' to the employer are not protected. [Citations.] Because Robles did not report his suspicions to a governmental agency, he did not engage in protected activity for purposes of § 1102.5(b)." (*Robles, supra,* at p. 1008.)

Robles did not involve a termination of employment *after* the amendment to section 1102.5, subdivision (b) became effective. Consequently, it does not support the conclusion that applying the amended version of the statute to a termination occurring after January 1, 2014, is a retroactive application of the statute.

In *Canupp,* it appears the plaintiff was terminated in February 2014 and the decision's reference to "her termination in February 2013" is simply a typographical error as to the year. (*Canupp, supra,* 181 F.Supp.3d at p. 791.) In that case, the plaintiff repeatedly reported to management alleged misconduct by an employee at the facility who helped a youth leave the facility through a window and engage in prostitution. (*Id*. at p. 789.) "In February 2013, she also reported to [] management alleged misconduct by a different employee [who brought another youth from the facility] to her home to engage in illicit conduct." (*Id*. at pp. 789–790.) The district court stated, "While plaintiff contends she was retaliated against for these internal complaints, internal complaints are not protected activity under section 1102.5." (*Id*. at p. 790.) The district court cited *Robles* as support. However, the district court ultimately denied the motion for summary judgment of the section 1102.5 claim. (*Canupp, supra*, at p. 795.) The court concluded the plaintiff's June 2013 disclosures of alleged sexual misconduct of the facility's staff to the California Department of Social Services was "protected activity for purposes of section 1102.5" because the department was a government agency. (*Canupp, supra*, at p.

790.) To summarize, despite the ultimate denial of summary judgment on the section 1102.5 claim, *Canupp* can be interpreted as authority for the position that the amended version of section 1102.5, subdivision (b) is not violated by a termination in 2014 for internal reports made in 2013.

It is well settled that decisions by the lower federal courts "are neither binding nor controlling on matters of state law." (*T.H. v. Novartis Pharmaceuticals Corp.* (2017) 4 Cal.5th 145, 175.) Nevertheless, such decisions may be persuasive when their analysis is thorough and well-reasoned. (*Ibid.*) The decision in *Canupp* provides little analysis of the retroactivity issue. It simply states a conclusion and cites *Robles* as authority without identifying the termination in *Robles* occurred in 2013. The failure to identify this difference in facts and the absence of any analysis of the retroactivity principles established by the California Supreme Court leads us to conclude *Canupp* is not persuasive authority and we will not apply its conclusion to the 2014 termination of Casillas's employment.

II. OTHER ISSUES

A. Tort Claim

The jury found in favor of Casillas on her tort cause of action, which alleged wrongful termination in violation of public policy. It determined her damages totaled $131,200, the same amount awarded under the two statutory causes of action.

On appeal, Medical Group contends Casillas's tort claim fails for the same reasons her statutory claims under section 1102.5 fail. Based on our conclusion that Casillas established her claim under section 1102.5, subdivision (b), it follows that the trial court properly denied Medical Group's motion of judgment notwithstanding the verdict on the overlapping tort claim for wrongful termination in violation of public policy.

B. Claim under Subdivision (c) of Section 1102.5

The jury also found Medical Group liable under section 1102.5, subdivision (c) on the ground Medical Group retaliated against Casillas for refusing to participate (1) in performing medical services outside the scope of her respiratory care license or (2) in the unlawful billing to Medicare for services not performed by a doctor. The jury rejected Medical Group's assertion that it had a legitimate, independent reason for discharging Casillas.

We do not consider the various claims of error Medical Group has raised with respect to Casillas's cause of action under subdivision (c) of section 1102.5. The damages awarded are adequately supported by the other two causes of action. Thus, any error as to the cause of action under subdivision (c) of section 1102.5 would be harmless.

DISPOSITION

The judgment is affirmed. Casillas shall recover her costs on appeal.

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FRANSON, J.

WE CONCUR:

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LEVY, Acting P.J.

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MEEHAN, J.